
In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 6484

UNITED STATES OF AMERICA,

Appellant,

vs.

JESSIE SMITH, Administratrix of the Estate of
JAMES W. WHITEHEAD, Deceased,

Appellee.

*Upon Appeal From the United States District Court
for the Western District of Washington,
Northern Division*

HON. JEREMIAH NETERER, JUDGE

Appellee's Petition for Rehearing

GRAHAM K. BETTS

Attorney for Plaintiff

1402 Smith Tower, Seattle, Washington

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PAUL P. O'BRIEN,

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*To the Hon. Curtis D. Wilbur, William H. Sawtelle
and J. Stanley Webster, judges in the above en-
titled Court:*

Jessie Smith, Administratrix of the Estate of James W. Whitehead, deceased, the appellee herein, by her attorneys respectfully petitions this Honorable Court

for a rehearing upon the two questions hereinafter set forth, and does hereby certify that this petition is made in good faith and that on the merits the same should be granted, and that it is not made for the purpose of delay.

I.

The rights of Lilly Gladys Whitehead were determined by this action.

The attention of the Court is directed to the opinion filed herein, on page 7 thereof, where the Court said:

“It should be stated that she (Lilly Gladys Whitehead) was not made a party by any amended pleading, and that no claim is asserted in the complaint adverse to her.”

In this particular it is believed that the Court erred, because the complaint and the amended complaint in this action alleged in Paragraph III (R. 2): “That immediately upon enlisting, desiring to be insured against the risks of war, the said James W. Whitehead applied for a policy of war risk insurance in the sum of \$10,000.00, *designating no authorized person as beneficiary on said policy.*” While it is admitted that no proof was made in support of the italicized portion of the allegation, it will be observed upon a review of the complete record that apparently both parties thought such proof unnecessary in view of

the default against Lilly Gladys Whitehead, and it will be observed that neither the defendant's motion for non-suit at the conclusion of the plaintiff's evidence (R. 64), nor its motion for dismissal of the complaint, made at the conclusion of all the evidence, stated such failure as one of the grounds in support of such motion. Consequently, it is not believed that the objection was sufficiently taken to preserve this question on appeal. See *Noonan vs. Caledonia Min. Co.*, 121 U. S. 393. The fact, as stated by this Court in its opinion, that the insured might have subsequently to the time of application designated a beneficiary, does not affect the finality of the complaint against Lilly Gladys Whitehead, as any such change would be a matter which could be raised only by an affirmative defense, and no affirmative defense was interposed in this case, nor is it admitted or conceded, as stated in the opinion of this Court, that the insured named his wife or anyone within the permitted class as beneficiary. The only suggestion in the record that she was so named is contained in the defendant's petition for joinder of additional party defendant (R. 9), which petition it cannot be contended was a pleading; consequently the allegation that "James W. Whitehead applied for a policy of war risk insurance in the sum of \$10,000.00, designating no authorized person as beneficiary on said policy"

stands before this Court unquestioned, and such allegation clearly would put any party claiming to be a beneficiary upon her proof.

It is further to be observed that the defendant Lilly Gladys Whitehead was joined as a party defendant not by the plaintiff, now your petitioner, but by the defendant, and the defendant by its petition for such joinder stated in Paragraph V thereof (R. 11), that the joinder was necessary to a complete and proper termination of this action. In view of this statement by the defendant, it would appear that the defendant had taken, and it has since maintained, the position of stakeholder, in the event any liability were established. Such liability having been established, the defendant Lilly Gladys Whitehead was in the position of an intervenor, made so by the defendant, and against whom no formal pleading was necessary. The fact that she was called a party defendant does not change her status from that of an involuntary intervenor to one against whom the plaintiff must offer evidence after default.

The Court apparently is of the opinion that the affidavit for default, stating as follows: "That upon motion of the defendant one Lilly Gladys Whitehead, who was designated as beneficiary in said policy, etc.," is an admission by the plaintiff that the said Lilly

Gladys Whitehead was so designated as a beneficiary. However, it is the plaintiff's position that such affidavit, made for the purpose of obtaining an order for publication of summons, is not a pleading, nor such a part of the record as to be, or to constitute, an admission by the plaintiff that the said Lilly Gladys Whitehead was so designated but, on the contrary, it is believed that the allegation in the complaint that no authorized person was designated is binding upon the Court and upon said Lilly Gladys Whitehead.

It is further submitted that should the Court adhere to its original decision in this case, the cause should be remanded for further proceedings against the said Lilly Gladys Whitehead because surely now the defendant, by judgment finding the deceased to have been totally and permanently disabled during the life of his policy of insurance herein sued upon, is stakeholder, or in the position of a disinterested third party holding money against which there may be adverse claims, for the settlement of which this Court should remand this case to the District Court, for determination of that single issue.

II.

The second question raised in this petition is solely for the purpose of clarifying the opinion of this Court in regard to the allowance of attorney's fees. The

decision filed, amended the judgment by "striking therefrom all payments accruing after the death of the veteran, awarding to the appellee only payments which had accrued at the time of the death of the insured. Attorney's fees will be reduced to one-tenth of this latter amount." In this respect, attention is called to the fact that by the action herein the full face value of the insurance policy was established and made payable by this action, and the full amount of such policy constitutes a part of the recovery, whether recovery for the plaintiff or for some other party yet to be determined, and in view of the War Risk Insurance Act, limiting as it does attorney's fees to one-tenth of the amount recovered, it is not believed that this Court intended to limit the attorney's fees only to amount payable to the estate. Rather it is submitted that such fees were necessarily reduced as a part of the judgment so that the stated amount thereof would not exceed one-tenth the amount of the judgment. It is further believed that the whole amount of the policy is payable by reason of the judgment in this case, and that no further judgment need be recovered against the defendant by any party in whose favor an award might be made, and in fact, that no further action could be maintained against the Government on this one policy, because were the said Lilly Gladys Whitehead to appear and claim the pro-

ceeds of the policy, said claim would not be denied by the Government, assuming she is not foreclosed by this action, and, consequently, no disagreement could be effected with the Bureau, by reason of which no Court could obtain jurisdiction to hear such cause.

For the foregoing reasons it is respectfully submitted that this Court should grant a rehearing upon the questions herein set forth.

Respectfully submitted,

WRIGHT and WRIGHT,

GRAHAM K. BETTS,

Attorneys for Appellee.

